HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S17/2026

BETWEEN:

PRESIDENT OF THE LEGISLATIVE COUNCIL OF NEW SOUTH WALES
Appellant

and

JAMES CULLEN
First Respondent

ATTORNEY GENERAL FOR NEW SOUTH WALES
Second Respondent

SPEAKER OF THE LEGISLATIVE ASSEMBLY OF NEW SOUTH WALES
Third Respondent

SUBMISSIONS FOR LEAVE TO INTERVENE OR TO BE HEARD AS AMICUS CURIAE

I CERTIFICATION

This submission is in a form suitable for publication on the internet.

II BASIS OF APPLICATION FOR LEAVE TO BE HEARD

1. The Honourable Damien Tudehope MLC seeks leave to intervene in this appeal in support of the result sought by the President but for different reasons. Mr Tudehope is the Shadow Attorney-General. He was a member of the Select Committee on the Proposal to Develop Rosehill Racecourse – whose document was allegedly released without approval, which was the subject of the Privileges Committee's inquiry. He is also Leader of the Opposition in the Legislative Council. In that capacity he would be "directly affected by a decision" as to whether or not the First Respondent's presence could be secured by an exercise of the powers in ss 7-9 of the *Parliamentary Evidence Act 1901* (NSW) (the **Act**).[1] That is because it affects the manner in which Legislative Council can conduct its business through its committees. There is utility in hearing from a leading member of the Council and the Shadow Attorney-General in circumstances where the Committee has not been joined and where the President takes a position broader than is necessary to secure attendance at a Committee of the Legislative Council.
2. Alternatively, even in the absence of a "direct" effect on his interests, Mr Tudehope seeks leave to intervene as *amicus curiae*, in circumstances where Mr Tudehope raises points of general importance that may assist the Court in resolving the appeal including by reference to alternative arguments to the question at the anterior level of statutory construction. The Court may not receive other assistance. In the Court below, the Attorney-General took the "unusual position"[2] of pressing the invalidity of ss 7-9, and the Speaker of the Legislative Assembly, who appeared below to uphold the legislation, does not seem to be taking an active role.
3. Mr Tudehope also seeks leave to extend the time for filing this intervention outside the 14 days required: HCR, rr 42.08A, 44.04, 4.02.

III WHY LEAVE SHOULD BE GIVEN

4. The issues presented in this appeal include the scope of the *Kable* doctrine in cases where traditional assumptions of 'constitutional' significance – such as the security of

[1] *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, [2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Levy v Victoria* (1997) 189 CLR 579, 603-604 (Brennan CJ).
[2] Submissions of the Attorney-General of New South Wales in NSWSC 2025/00400236 dated 18 November 2025, [2]; Exhibit DFT3 to the affidavit of Mr Tudehope sworn 5 May 2026.

intramural parliamentary process – are concerned. It was assumed in the Court of Appeal that the certification contemplated by s7 the Act was a "proceeding in parliament"

5. It was also assumed below – and appears still to be assumed – that ss 7-9 authorise the future detention of a person for any period of time after the production of a warrant from a Judge of the Supreme Court. Critical to the Court of Appeal's conclusion was the prospect that such a warrant "command[s] a person's arrest and detention then and there, and thereafter in accordance with future orders made by the President" (CA [6]-[8]) which might never be before the Supreme Court.

6. No issue has been taken with that construction of s9 of the Act, but there is little to commend it. It may be in the interests of the Appellant to advocate for a construction of the scope of ss 7-9 of the Act that is broader than is needed by any relevant Committee which seeks only the attendance of a person before it, for a limited purpose and for a limited time. It may also be in the interests of the Appellant, as the signatory of the certificate, to take a broader view of "parliamentary proceedings" for the purposes of parliamentary privilege than is sufficient for a Committee.

7. In those circumstances, there is reason to believe that the parties "may not present fully the submissions on a particular issue".[3] In fact, they have not done so. There is clear benefit in an intervener presenting an alternative construction of ss 7-9. That alternative construction may require only a more limited traversal of the scope of the *Kable* doctrine in these circumstances, all of which would be consistent with the prudential approach to resolve questions of that breadth only to the extent that it is "necessary" to do so.[4] Indeed, as the Court recognised below at CA [23], "it may suit some parties to adopt a construction of the legislation which advances their forensic goals".

8. Even in the absence of a direct effect, Mr Tudehope should nonetheless be granted leave to present submissions as *amicus curiae* on the basis that the Court would be "significantly assisted by the submissions of the *amicus* and that any costs to the parties or any delay consequent on agreeing to hear the *amicus* is not disproportionate to the expected assistance".[5]

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[3] *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Levy v Victoria* (1997) 189 CLR 579, 603 (Brennan CJ).
[4] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [11], [149]; *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36, [72].
[5] *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, [4] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Levy v Victoria* (1997) 189 CLR 579, 604-605 (Brennan CJ).

9. As to the grant of leave to extend the time for intervening. Mr Tudehope's intervention supports the result sought by the President in upholding the legislation. The 14 days required by HCR r 44.04.02 expired on Friday, 1 May 2026. This application seeks an extension by a matter of days. Mr Tudehope only obtained the written submissions of the Appellant on 22 April 2026 when he wrote to Mr Reynolds, Clerk of the Parliaments. He acted expeditiously in bringing this application and has undertaken not to seek costs of his intervention.

10. The Court of Appeal noted at [72] that the First Respondent "advanced secondary, alternative submissions" below. Those alternative submissions deal largely with the matters raised in this application for leave to intervene.[6] At least for that reason, there is no prejudice to the First Respondent in having the Intervener's arguments ventilated in this Court.

IV SUBMISSIONS

A Parliamentary privilege

A1 The position of the parties and the assumption of the Court of Appeal

11. The decision of the Court of Appeal proceeded on an assumed construction of the phrase "proceedings in Parliament". As the Court of Appeal noted at [21], "[a]rgument proceeded on the basis that the decision-making process, up to and including any ultimate certification by the Speaker, are all "proceedings in Parliament" for the purposes of Article 9 of the Bill of Rights".

12. Naturally, that assumption was forensically favourable for the First Respondent in that it attenuated – as far as possible – the decisional independence of a Judge of the Supreme Court under s 8 of the Act (the President's "*third step*" AS [16]), and for the Appellant to the extent that it limited the scope for judicial inquiry into the President's conduct when signing the certificate under s 7 (that is the President's "*second step"* AS[15]).

13. It is not inevitable that the certification under s 7 constitutes "proceedings in Parliament" for the purposes of Art 9, nor does the evidence that may be called in any Court proceeding superintending the warrant after its issue (eg to prove someone attended and was asked questions) have the effect of "impeaching" or "questioning" such "proceeding".[7]

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[6] Applicant's Submissions in NSWSC 2025/00400236 dated 12 November 2025, [20], [27], [38], [41], Exhibit DFT 2 to the affidavit of Mr Tudehope sworn 5 May 2026.

[7] *Erglis v Buckley* [2004] 2 Qd R 599, [13] (McPherson JA).

14. Mr Tudehope's intervention is relevant at the "*third step*" of the President's analysis when the Court issues the warrant under s 8: AS [16]. But even if that is rejected, it is relevant in any subsequent supervision of the warrant, for example, at the President's "*sixth step*" (AS[19]).

A2 The scope of Parliamentary Privilege and the exclusive cognisance of Parliament

15. Article 9 of the Bill of Rights applies in New South Wales both by the common law doctrine of reception, and by force of section 6 of the *Imperial Acts Application Act 1969* (NSW).[8] Its application has been described as unusual.[9] It is not to be read narrowly, nor as an ordinary statute but is a provision of high constitutional importance[10] – but that does not mean that its scope is unlimited.[11]

16. It is important to note the source of its application in NSW because Art 9's terms (or the 'rule' it contains) have been extended by legislation in several other States. For example, the Commonwealth Act extends privilege to "acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House".[12] Those acts include "the preparation of a document…incidental to the transacting of any such business".[13] No such extension exists in New South Wales.

17. It was that extension in the Commonwealth Act that supported the conclusion in *Rowley v O'Chee* [2000] 1 Qd R 207 that documents prepared for the conduct of a committee of inquiry were subject to privilege and that no part of the preparation of those documents could be "questioned or impeached".[14] Even then, those words "do not transform every action of a parliamentarian in the pursuit of his or her vocation into 'proceedings in Parliament'".[15]

18. By contrast, parliamentary privilege in NSW directs attention to the conduct occurring in Parliament. It directs attention to whether "if such actions did not enjoy privilege, this would be likely to impact adversely on the core or essential business of Parliament".[16]

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[8] *Egan v Willis* (1998) 195 CLR 424, [22].
[9] *Director of Public Prosecutions (NSW) v President of the Legislative Council of New South Wales* [2026] NSWCA 20 (***DPP v President***), [83].
[10] *Egan v Willis* (1998) 195 CLR 424, [24].
[11] *DPP v President* [2026] NSWCA 20, [89].
[12] *Parliamentary Privileges Act 1987* (Cth), s 16.
[13] *Parliamentary Privileges Act 1987* (Cth), s 16(2)(c).
[14] [2000] 1 Qd R 207, 222 (McPherson JA)
[15] *Rowley v O'Chee* [2000] 1 Qd R 207, 213.
[16] *President of Legislative Council (WA) v Corruption and Crime Commission (No 2)* [2021] WASC 223, [131], citing *R v Chaytor* [2011] 1 AC 684, [47] (Lord Phillips).

19. As to "proceedings" in Parliament, Erskine May, Parliamentary Practice, 25th ed (2019), para 13.12 describes "proceedings in parliament" in this way (cited in *R (Miller) v Prime Minister* [2020] AC 373 at [67]):

> The primary meaning of proceedings, as a technical Parliamentary term, which it had at least as early as the 17th century, is some formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognised by its inclusion in the formulation of article 9. An individual member takes part in a proceeding usually by speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking.

20. To similar effect, in *R v Chaytor* [2011] 1 AC 684 the UK Supreme Court rejected a claim for parliamentary privilege that sought to insulate former members from criminal liability for expenses fraud. The Supreme Court interpreted "proceedings" in Parliament as focusing on the collegiate activities of the House and not the consequences or administrative acts that were said to follow decisions taken in the House: [17]

> Submitting claims for allowances and expenses does not form part of, nor is it incidental to, the core or essential business of Parliament, which consists of collective deliberation and decision making. The submission of claims is an activity which is an incident of the administration of Parliament; it is not part of the proceedings in Parliament.

21. Two related limits on what any Court can do in cases such as the present must be stated. First is what was said by Dixon CJ in this Court in *R v Richards; Ex parte* ***Fitzpatrick and Browne*** (1955) 92 CLR 157, 162 that "it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise."

22. Second is the related concept of the exclusive cognisance of Parliament. In *Attorney-General (Tas) v Casimaty* (2024) 98 ALJR 1139 at [51], Edelman J observed that "exclusive cognisance" describes a principle that "wholly encompasses, and extends beyond, Art 9 of the Bill of Rights".

23. In *R v Chaytor*[18] it was explained by Lord Phillips at [63] in the following terms:

> Exclusive cognisance refers not simply to Parliament, but to the exclusive right of each House to manage its own affairs without interference from the other or from outside Parliament. The boundaries of exclusive cognisance result from accord between the two Houses and the courts as to what falls within the exclusive province

[17] *R v Chaytor* [2011] 1 AC 684, [62] (Lord Phillips).
[18] [2011] 1 AC 684 [63], see also *AG (Tas) v Casimaty* (2024) 98 ALJR 1139, [52] (Edelman J).

of the former. Unlike the absolute privilege imposed by article 9, exclusive cognisance can be waived or relinquished by Parliament.

24. Notably the doctrine of exclusive cognisance is not "absolute" and can be relinquished by Parliament. So much is evident in the present case where s 7 is directed "*to a Judge of the Supreme Court"* and in s 8 the legislature has conferred power on the Court to issue the warrant, rather than leaving the Parliament to issue the warrant itself (as in Tasmania, Queensland and Western Australia).

A3 The application of parliamentary privilege to the certification under section 7

25. The present argument is that the certification by the President under s 7 is not a proceeding in Parliament and is not an occasion of "undoubted privilege" that will be reserved to the Parliament to judge the occasion or manner of its exercise. That is so for the following reasons.

26. The act is not one done by the House or any committee in a "collective capacity" as referred to by *Erskine May*. That is in clear contrast to the issue of the initial summons to a witness provided by section 4 of the Act and undertaken by a House, or an order of a committee.

27. The execution of a Certificate under s 7 and in the form specified in Schedule 2 to the Act must be done by the President. But it need not be done by the President *in camera*. Moreover, the certification is directed "*to a Judge of the Supreme Court"* in section 7, meaning the intended recipient is the Supreme Court and not other members of the Legislative Council.

28. In truth, the collegiate decision taken by the House is the issue of the summons to the witness under section 4. The certification that follows non-attendance under s 7 is, to borrow from the language of *R v Chaytor*, an administrative act that follows as a consequence of the collective decision and not part of the proceedings in Parliament.

29. That is clear from the language of section 7, which is expressly premised on the President's state of "satisfaction". That is a "jurisdictional fact" of a special kind[19] that the Parliament has imposed on the President as an independent and impartial[20] decision-maker (see also AS[15.3]). There is no "certificate" for the purposes of s 8 if there is no

[19] *Minister for Immigration v Eshetu* (1999) 197 CLR 611, [130]-[131] (Gummow J).
[20] *Constitution Act 1902* (NSW), s 22G(1): "*there shall be a President of the Legislative Council, who is the Presiding Officer of the Legislative Council and is recognised as its independent and impartial representative*"

valid "certificate" conforming to the express and implied conditions in s 7, including that the state of satisfaction was reasonably formed.[21]

30. The reasonableness or otherwise of the President's satisfaction that a witness has failed to attend or that that witness' non-attendance was "without just cause or reasonable excuse" (s 7) is justiciable. Naturally, the Judge would consider the prospect that attendance at the Committee may require questioning for a protracted period when assessing the reasonableness or otherwise of the satisfaction that there was no "just cause or reasonable excuse" for refusing to attend. At least to that extent, the Court of Appeal's concern at [7] that the inquiry "might extend weeks or months or years" *will* be accounted for.

31. The present case is not on all fours with *Fitzpatrick and Browne.* In that case the resolution was carried by a majority of the House and the warrant was issued by the Speaker.[22] By contrast the present legislative scheme enlists the Court in issuing the warrant only after the independent certification by the President. It appears to be intended to avoid the situation that arose in a case like *Fitzpatrick and Browne*, where imprisonment was ordered without a fair trial and no meaningful review could occur beyond the face of the warrant issued in the exclusive cognisance of Parliamentary chambers.[23]

32. In that respect *Fitzpatrick and Browne* was a case that would have required the Court to examine the resolution of the House. That is precisely the type of 'intra-mural' issue,[24] and collective decision-making within Parliament's exclusive cognisance. By contrast, in the present case, the examination of the President's state of satisfaction is likely to require consideration of the evidence that the summons was served, and that the witness failed to attend "without just cause or reasonable excuse". None of those matters are the core business of Parliament as a collective decision-making body. Again, the argument accepts the situation is different to the summons to the witness (s 4 of the Act) issued by a committee, which remains unreviewable.

33. Section 7 confers an individual responsibility on the President or Speaker to certify based upon reaching the relevant state of "satisfaction" being precisely the type of language used to condition the exercise of administrative power. While section 8 is an express

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[21] *George v Rockett* (1990) 170 CLR 104, 110-113, 115-116.
[22] *Fitzpatrick and Browne* (1955) 92 CLR 157, 162.
[23] A Mason, "A New Perspective on Separation of Powers" (1996) 82 *Canberra Bulletin of Public Administration* 1 at 5, cited in *Wainohu v New South Wales* (2011) 243 CLR 181 at [49] on a different point.
[24] *AG (Tas) v Casimaty* (2024) 98 ALJR 1139, [103] (Edelman J).

conferral of the power to issue the warrant on the Court – it would have been equally possible for the Act to simply permit the President or Speaker to issue the warrant upon being 'satisfied'. But to the contrary, when reading sections 7 and 8 together it is evident that the Parliament has chosen to relinquish "exclusive cognisance" of the process of certification of non-attendance, and to give the Court responsibility for the issue of the warrant. At least in that respect the scheme is distinguishable from *Casimaty*.

34. But even if, contrary to above, the certification is a proceeding in parliament or the Court concluded there is no distinguishing feature from *Fitzpatrick and Browne,* there is still a question as to what precisely the Court can review. In the present statutory context (not present in *Fitzpatrick and Browne*), that is answered by the imposition of a requirement for the President to be "satisfied" of certain matters. To say that the state of satisfaction is examinable is only to restate that where a statute gives power to a repository it is for a court to determine whether the conditions for its exercise have been satisfied. All this is but one aspect of the "constitutional relationship" between the courts and Parliament.[25] As this Court recognised in *Egan v Willis*,[26] with reference to the decision of McLachlin J in *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319 at 384, the Court is able to review the exercise of the power at least at the "initial jurisdictional level" (cf the position of the President AS[16.3]). A "certificate" means a legally effective certificate.

A4 Application of parliamentary privilege on any application to set aside the Supreme Court's warrant

35. The Supreme Court is likely to issue the warrant *ex parte* as an administrative act. A challenge to its issue may be made immediately on the basis that the statutory conditions for its issue had not been strictly complied with[27], or there may be a later application to set aside it aside or for *habeas corpus* on the basis that the purpose of the warrant is spent, including because a witness has attended and answered questions.

36. On the immediate application the Court *can* receive evidence of the witness's actual non-attendance and of the reasons given for it (the underlying facts of the President's "satisfaction" under s 7). On a later application the Court can receive evidence of the fact the witness attended and was questioned, or evidence that the period of detention exceeds

[25] *Zheng v Cai* (2009) 239 CLR 446, 455 [28].
[26] (1998) 195 CLR 424, [27].
[27] *George v Rockett* (1990) 170 CLR 104, 110-111; *State of New South Wales v Corbett* (2007) 230 CLR 606, [87]-[89] (Callinan and Crennan JJ).

what is reasonably necessary to bring the witness before the relevant chamber or committee.

37. Evidence of the fact of non-attendance, or the reasons for it, are not matters that "impeach"[28] conduct which can properly be described as "proceedings in Parliament". Review of such facts by a Court would have no adverse effect on the essential business of parliament.

38. If the Court is satisfied that review of the decision-making of the President does not undermine the essential functioning of Parliament and that no privilege attaches then an essential foundation of the Court of Appeal's reasoning falls away: see CA [21].

39. The primary vice for the Court of Appeal — that the judge has "no meaningful evaluative determination" (CA [24], [56], [66]–[67]) — depends on the assumed premise that the President's "satisfaction" under s 7 lies wholly within the exclusive cognisance of the chamber. Once it is recognised that the President's satisfaction is not a "proceeding in Parliament" in the relevant sense, but an individual administrative act conditioned on jurisdictional facts which fall to be determined by a judge, the judge under s 8 is not a "mere functionary", and once it is recognised that the Supreme Court can superintend the effect of the warrant after its issue, then the threat to institutional integrity recedes.

B The preferable construction of section 9 does not authorise indefinite detention

40. The starting point taken by the Court of Appeal was that sections 7-9 of the Act authorise the indefinite detention of a summoned person. The assumption was that section 9 applies the "authority" of the Judge's warrant issued under section 8 to *any* order later made by the President or Speaker from time to time.

41. That engaged the limitation on State legislative power identified in *Kable* because the upshot was said to be that the Judge of the Supreme Court "*would be a mere functionary and have no choice but to sign and seal the warrant*" and would be authorising "*the indefinite detention of the person pursuant to subsequent orders of the President, whose content and extent could not even be known at the time the judge became obliged to sign the warrant*": CA [66]

42. There are several problems with that line of reasoning.

43. *First*, the Court of Appeal assumed that "it is not open" to submit that the "warrant" issued under s 8 is to be "*limited, say, to the period necessary in order for the purpose for which the summons was issued to be performed*": CA [5]. Section 8 is a provision

[28] *Mundey v Askin* [1982] 2 NSWLR 369, 373D-G.

that is expressly tied to a limited purpose or function. The warrant only has force to the extent that it is necessary "for the purpose of bringing the person before the Council, Assembly or Committee to give evidence".

44. *Second*, section 9 must be read harmoniously with section 8. "Any order" which may issue under s 9 must be referable to the purpose of the warrant in s 8. The result may be that the proper construction of the "future-order" power in s 9 is not as drastic as it was held to be at CA [27], that "*[t]hey may also include subsequent orders extending the person's detention in custody for an unknown period of time, until his or her ultimate release*" or that it "*authorises and requires the Sheriff, police and other officers thereafter into the indefinite future to comply with all further written orders from the President*": CA [9].

45. It is a basic principle of statutory construction that statutory powers only be read consistently with the purpose for which they were conferred.[29] Still more where those powers impinge upon fundamental liberties such as bodily integrity and freedom from detention. Powers of detention are ordinarily read to "minimise[] the statute's encroachment upon fundamental principles, rights and freedoms at common law".[30] Equally foundational is that so far as possible statutes be read consistently with constitutional limitations.[31] Where there is a constructional choice – as there is regarding the nature and scope – the least intrusive should be preferred.

46. *Third*, the issue of the warrant, and the deprivation of liberty that may result will be subject to review. Undoubtedly, the detention could be subject to an application for *habeas corpus*: s 71 *Supreme Court Act 1970* (NSW). On such application the President would bear the onus to demonstrate the legality of his detention.[32] Additionally, the Supreme Court has any other necessary power to control its processes,[33] including by setting aside the warrant.

47. In that way the Supreme Court exercises control over the apprehension and detention of the person to the extent that it exceeds what is reasonably necessary to bring the person before the Committee for questioning.

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[29] *Johns v Australian Securities Commission* (1993) 178 CLR 408, 423-424.
[30] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [11], [23].
[31] *Hogan v Hinch* (2011) 243 CLR 506, [27]-[51] (French CJ), [66]-[69] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
[32] *R v Governor of Metropolitan Gaol* [1963] VR 61 at 62.
[33] *Jago v District Court (NSW)* (1989) 168 CLR 23, 74 (Gaudron J); Supreme Court Act 1970 (NSW), s23.

48. Some limits on detention must be understood as inseparable from the purpose of the Parliament's power, for example, upon the suspension of business of the Legislative Council in the event of an election,[34] and the dissolution of (most) committees upon prorogation. In *Stockdale v Hansard* the limited purpose of detention until Parliament's prorogation was expressly recognised, where it was said: [35]

> [the House of Commons] privilege to commit [for contempt] is not better known than this limitation of it. Though the party should deserve the severest penalties, yet, his offences being committed the day before a prorogation, if the House ordered his imprisonment but for a week, every court in Westminster Hall and every judge of all the courts would be bound to discharge him by habeas corpus.

49. Other limits must be the product of statutory construction in conformity with constitutional limitations.[36] It is an obvious application of the principle of legality that clear words are required if a statute is to authorise holding an arrested person in custody for a purpose other than for the purpose of charging that person and bringing him or her before a justice of the peace or court as soon as is practicable.[37]

50. Read down so as to authorise only the original production of the witness for the purpose for which the summons was issued, ss 7–9 fall comfortably within that limit. So construed, the regime resembles the unobjectionable administrative warrant-issuing functions discussed in *Grollo v Palmer* (1995) 184 CLR 348 and other cases (see AS [21]). It also resembles the historical use of a writ of *habeas corpus* to ensure the defendant's attendance,[38] the writ of *capias ad respondendum* that was modified in NSW in the *Arrest on Mesne Process Act 1902* (NSW),[39] and the existing power for the Supreme Court to secure attendance of a prisoner at an inferior court or tribunal: s 72 *Supreme Court Act 1970* (NSW).

51. *Fourth*, it may well be that section 8 can stand without section 9. Section 8 on its own terms is sufficient to give force to the warrant issued by a Judge of the Supreme Court. The Court of Appeal did not consider whether the application of the *Kable* limitation

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[34] *Constitution Act 1902* (NSW), s 22F.
[35] *Stockdale v Hansard* (1839) 9 A & E 1, 114; 112 ER 1112, 1156, cited with approval in *R v Chaytor* [2011] 1 AC 684, [61].
[36] s 31 of the *Interpretation Act 1987* (NSW), *Tajjour v NSW* (2014) 254 CLR 508, [178] (Gageler J)
[37] *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, [33]; *Al-Kateb v Godwin* (2004) 219 CLR 562, [19]-[20] (Gleeson CJ); see in an adjacent context *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, [41].
[38] *Jago v District Court (NSW)* (1989) 168 CLR 23, 67 (Toohey J).
[39] And eventually repealed: *Supreme Court Act 1970* (NSW), s 16(3)(b), s 5, Schedule 1; see also Second Report of the Law Reform Commission on Supreme Court Procedure, LRC 14, dated 2 November 1971, [18]-[29].

could be confined to ss 7-8. It equally suffices that the first clause of s 9(1) can stand – to give force to the warrant made under s 8 (ie "*Such warrant shall be a sufficient authority…for the purpose of giving evidence"*) – and to sever the balance of section 9 (ie from the words "*pursuant to any order under the hand and Seal of the President…*) if found necessary.[40] Provisions separated in form are ordinarily presumed to be severable in intent.[41]

52. The *Kable* question should be considered within that more limited frame of reference – a power to issue a warrant which only demands the original production of a person before a Committee for questioning. So construed, the regime imposes a duty on the Court to issue a warrant if it is established the certification was within jurisdiction. The force of that warrant is exhausted upon the witness being produced before the chamber or committee on the occasion to which the summons relates. None of the constitutional vices identified by the Court of Appeal arise.

C Relief

53. If Mr Tudehope's arguments are accepted it would demonstrate error in the decision of the Court of Appeal. Mr Cullen's "alternative submissions" were not addressed below: CA [72]. Mr Tudehope undertakes not to seek costs.

V ESTIMATE

54. The Intervener anticipates that oral argument will take 20 minutes.

Dated: 5 May 2026

P F SANTUCCI
New Chambers
(02) 9151 2071
santucci@newchambers.com.au

A MOHSENI
Eleven Wentworth Chambers
(02) 8042 6857
mohseni@elevenwentworth.com

The Honourable Damien Tudehope MLC is represented by Solomon Tudehope Solicitors, Suite 9, Level 2/15 Parnell St, Strathfield NSW 2135

[40] *Interpretation Act 1987* (NSW), s 31(2)(a).
[41] *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 91-93 (Dixon J).

ANNEXURE TO INTERVENER'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	*Arrest on Mesne Process Act 1902* (NSW)	Compilation No. 24 (31 July 1902)	Entire	Illustrative purposes	
2	*Constitution Act 1902 (NSW)*	Current	Section 22F, 22G	In force at the time of the Court of Appeal's decision.	
3	*Supreme Court Act 1970* (NSW)	Historical version for 1 July 2024 to 27 March 2026	Sections 16(3)(b), 23 69, 71, 72, Schedule 1	In force at the date of the Court of Appeal's decision	
4	*Parliamentary Evidence Act 1901* (NSW)	Current, Compilation No 43 (17 July 2009)	Sections 4, 7, 8, 9	In force at the date of the Court of Appeal's decision.	